Judge Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

1LT EHREN WATADA, Petitioner, v. LT. COL. JOHN HEAD, Military Judge, Army Trial Judiciary, Fourth Judicial Circuit; LT. GEN. CHARLES JACOBY, Convening Authority, Ft. Lewis, Washington, Respondents.	NO. C07-5549BHS **RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONER'S APPLICATION FOR PRELIMINARY INJUNCTION**

Respondents, through the undersigned counsel, hereby submit this memorandum of points and authorities in opposition to the application of petitioner for a preliminary injunction indefinitely staying his pending court-martial.

INTRODUCTION

Respondents, Lt. Col. John Head and Lt. Gen. Charles Jacoby, hereby oppose the application of petitioner 1LT. Ehren Watada for a preliminary injunction on the grounds that the interlocutory review of court-martial proceedings he is requesting is precluded by *Schlesinger v. Councilman*, 420 U.S. 738 (1975), and because, in any event, petitioner has failed to make a showing sufficient to

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justify the extraordinary relief he seeks.[1] Any further stay of the pending court-martial would unjustifiably interfere with and disrupt the Army's ability to appropriately discipline its Soldiers during times of conflict as well as in times of peace.

STATUTORY AND REGULATORY BACKGROUND

I. Congress' and the President's Authority to Provide Rules for the Maintenance of Good Order and Discipline.

Article II, § 2 of the Constitution provides that the President is the Commander in Chief of the armed forces. Article I, § 8 of the Constitution provides that Congress has the power to raise and support armies and make rules for the government and regulation of the armed forces. Under these constitutional provisions, Congress has enacted 10 U.S.C. Chapter 47, the Uniform Code of Military Justice (UCMJ), which provides the rules and procedures of military law.

II. The Military Justice System.

Given the importance of maintaining good order and discipline in the armed forces, Congress has empowered military commanders with the authority to implement the military justice system. Service members are tried for alleged crimes by courts-martial. A general court-martial, the type of court-martial at issue in this case, is typically convened by a general officer who has been granted that authority by the Secretary of a military department. Rule for Court-Martial (RCM) 504(b)(1). If the convening authority, in this case respondent Jacoby, finds that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it to trial.

A court-martial is a court of limited jurisdiction. 10 U.S.C. §§ 802-03; *U.S. v. Smith*, 4 M.J. 265 (C.M.A. 1978). Military judges are empowered and, indeed, obligated to hear and rule on all trial and pretrial motions, to include challenges to the court-martial's jurisdiction. RCM 801(a). A general court-martial consists of a military judge and not less than five members, and a prosecutor (trial counsel) and defense counsel. RCM 501(a)(1).

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[1]Although petitioner has not labeled his application as such, given the procedural posture of the case, what is before the Court is, in substance, an application for injunctive relief *pendente lite*, and, therefore, Rule 65, F.R.Civ.P., is fully applicable.

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After a sentence is adjudged in any court-martial, the accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. RCM 1105(a) and (b). Before the convening authority takes action on a record of trial by a general court-martial, that convening authority's staff judge advocate (SJA) must forward a recommendation to the convening authority. RCM 1106(a). The record of trial, together with the accused's submissions and the SJA's recommendation, are forwarded to the convening authority for action.

The convening authority takes action on the sentence and, in his discretion, the findings. RCM 1107. Before taking action, the convening authority must consider the result of trial, the SJA's recommendation, and any matters submitted by the accused. RCM 1107(b)(3)(A). The convening authority may, in his sole discretion, change any finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated, or set aside any finding of guilty. RCM 1107(c)(1) and (2). Additionally he may, for any or no reason, disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature so long as the severity of the punishment is not increased. RCM 1107(d). The convening authority may not increase the punishment imposed by a court-martial. *Id.*

In the armed forces, the right to appeal a court-martial finding or sentence is statutorily created by the UCMJ. Pursuant to 10 U.S.C. § 866, many trial decisions may be appealed to the service Court of Criminal Appeals which are intermediate appellate courts which fulfill functions similar to the United States Circuit Courts of Appeals. Any case that involves the dismissal of a commissioned officer or imprisonment for more than one year is automatically appealed to the Court of Criminal Appeals unless waived. *Id.* Further, pursuant to 10 U.S.C. § 867, appeal may then be had to the Court of Appeals for the Armed Forces (CAAF), and, possibly, to the United States Supreme Court. 10 U.S.C. § 867a; 28 U.S.C. § 1259.

PROCEDURAL HISTORY

On July 5, 2006, petitioner was charged with one specification of missing movement by design, and four specifications of conduct unbecoming an officer and a gentleman, in violation of Articles 87 and 133 of the UCMJ. Charge Sheet, Record of Trial I ("R. I"), following p. 6. The

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charges stemmed from petitioner's refusal to deploy to Iraq on June 22, 2006, and from various public statements petitioner made between May and August of 2006. *Id.* Proceedings began with petitioner's arraignment and a motions hearing on January 4, 2007. R. I, p.1. On January 16, 2007, the military judge issued a ruling on petitioner's proposed "Nuremberg Defense." R. I, Appellate Exhibit (App. Ex.) XXI. Petitioner wished to argue in his defense that he was not required to obey the order to deploy, because he believed that the war in Iraq was an illegal war, and that obeying the order would constitute a war crime. R. I, pp. 70, 74-75. The military judge ruled that petitioner's motive for refusing to deploy was irrelevant, as it did not relate to any of the elements of missing movement under Article 87, UCMJ. R. I, App. Ex. XXI. The military judge ruled that, as a matter of law, the order to deploy was lawful, and that petitioner was not allowed to present evidence on the legality of the war in Iraq or his motive for missing movement. *Id.*

Petitioner's trial was held on February 5-7, 2007. R. I. Petitioner entered a plea of not guilty to all charges and specifications. R. I, p. 125. Petitioner and the Government entered into a pretrial agreement, where he and the Government agreed to a stipulation of fact, in exchange for the Government dismissing two charged specifications. CAAF Joint Appendix (JA), pp. 4-5. The stipulation of fact was long and detailed. JA, pp. 6-19. In the stipulation, petitioner admitted that on June 22, 2006, he "intentionally missed the movement of his flight to Iraq." *Id.* at 12. Petitioner admitted he knew he was scheduled to be aboard the plane, and was specifically told about the flight by a superior commissioned officer. *Id.* Petitioner admitted he "intentionally did not board the aircraft and as a result, missed the movement of Flight Number BMYA91111173." *Id.* The military judge conducted an inquiry into the stipulation of fact. R. I, pp. 126-140. The military judge further discussed the relationship between the pretrial agreement and the stipulation of fact. R. I, pp. 144-45. The military judge stated the circumstances in which the pretrial agreement could be cancelled. R. I, p. 146. Based on petitioner's answers, the military judge accepted the stipulation into evidence. R. I, p. 149. The Government moved to dismiss "Specifications 2 and 3 of [C]harge II without prejudice, to ripen into prejudice upon conclusion of the proceedings." R. I, p. 178.

The court was assembled and the Government presented its case. The stipulation of fact was published to all of the members, who read it completely before the close of the Government's case. R. I,

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p. 263. The panel watched both videos that were attached to the stipulation of fact. R. I, p. 270. The military judge also told the members that, as a matter of law, "the order to deploy, if given, is lawful." R. I, p. 310.

After the close of the Government's case, petitioner's trial defense counsel submitted a proposed instruction. R. II, App. Ex. XXVI. The instruction stated that "The evidence has raised the issue of mistake on the part of the accused concerning his belief that he had a legal and moral obligation to refuse to participate in the war in Iraq relating to the offenses of missing movement." *Id.* The military judge began an inquiry into whether petitioner's belief that he had a valid mistake of fact defense indicated a misunderstanding regarding the stipulation of fact. R. I, p. 354. Following this inquiry, the military judge rejected the stipulation of fact and nullified the pretrial agreement. R. I, p. 372. After a recess the Government moved for a mistrial, which the military judge granted over defense objection. R. I, pp. 374-75. The military judge ruled that the mistrial was granted based upon the material breach of the pretrial agreement due to the military judge's rejection of the stipulation of fact. R. I, p. 379.

Charges were re-preferred and referred for trial on February 23, 2007. R. II, App. Ex. I. On May 17, 2007, petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition (hereinafter First Petition) and Application for Stay of Proceedings with the Army Court of Criminal Appeals (ACCA), asking that all charges and specifications be dismissed on the grounds that the subsequent proceedings were barred by the double jeopardy clause of the Fifth Amendment of the U.S. Constitution and Article 44, UCMJ. JA, pp. 23-56. On May 18, 2007, ACCA issued an order to the Government to provide an authenticated record of trial for the pre-mistrial court-martial proceedings (R. I) and to show cause why the writ should not be granted. JA, pp. 20-21. ACCA also granted petitioner a limited stay, allowing the trial court to proceed with pretrial matters up to, but not including, assembly of the court-martial. *Id.* On June 29, 2007, ACCA denied petitioner's writ and lifted the stay, on the grounds that petitioner failed to first seek relief at the trial court level. JA, p. 22.

On July 2, 2007, petitioner filed a motion to dismiss, on double jeopardy grounds, in the trial court. R. II, App. Ex. XXI. On July 5, 2007, the United States filed its opposition to the motion to dismiss. R. II, App. Ex. XIX. On July 6, 2007, both parties were given the opportunity to present evidence and argue their positions. JA, p. 333; R. II, pp. 47-91. On July 11, 2007, the military judge

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issued written findings of fact and conclusions of law, denying petitioner's motion to dismiss. JA, pp. 333-38. On July 27, 2007, petitioner filed a Renewed Petition for Extraordinary Relief (Second Petition) and a second Application for Stay of Proceedings with ACCA. JA, p. 183-308. ACCA ordered the Government to provide an authenticated copy of the post-mistrial court-martial proceedings (Record of Trial II (R. II)). On July 31, 2007, the United States filed its opposition to the Second Petition. JA, pp. 309-26. On August 27, 2007, petitioner filed a motion with ACCA, requesting an expedited ruling on his stay application. *See* JA, p. 1. On August 28, 2007, ACCA denied petitioner's Second Petition, on its merits, and his application for a stay. JA, pp. 1-2.

On September 17, 2007, petitioner filed a Petition for a Writ of Prohibition and an Application for Immediate Stay of Trial Proceedings in CAAF. On October 3, 2007, the same day that petitioner filed his reply in support of his request for a writ of prohibition at the CAAF, he filed his Petition for a Writ of Habeas Corpus in this Court. Dkt # 1.

On October 5, 2007, CAAF denied petitioner's application. Later that same day, this Court entered an order enjoining the pending court-martial proceedings until October 26, 2007, or until further order of the Court. Dkt. #9.

ARGUMENT

I. This Court Does Not Have Jurisdiction to Intervene in a Pending Court-Martial Except in Limited Circumstances Not Applicable to This Case

The Supreme Court has held that both subject matter jurisdiction and "equitable jurisdiction" constrain the reach of Article III courts. *Schlesinger v. Councilman*, 420 U.S. 738, 754 (1975). Equitable jurisdiction is concerned with "whether consistently with the principles governing equitable relief, the court may exercise its remedial powers." *Id.* Comity is a doctrine holding that "one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Rhines v. Weber,* 544 U.S. 269, 273-274 (2005) (quoting, *Darr v. Burford*, 339 U.S. 200, 204 (1950)). Although the Supreme Court has noted that concerns of federalism, which drive the doctrine of comity, are absent from court-martial proceedings, it also recognized that comity concerns are at least as compelling in the military context due to the exigencies of the military's primary business which is "to

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fight or be ready to fight wars should the occasion arise." *Councilman*, 420 U.S. at 757 (*quoting Toth v. Quarles*, 350 U.S. 11, 17 (1955)). As the Court observed, "[t]he military is 'a specialized society separate from civilian society with 'laws and traditions of its own [developed] during its long history.'" *Id*. (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). And, "[i]n order to prepare for and perform its vital role, the military must insist upon a respect for duty and discipline without counterpart in civilian life." *Id*. In fact, the Supreme Court has held that:

> The statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil courts. *But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. * * * Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is sui generis; it must be so, because of the peculiar relationship between the civil and military law.*

Burns v. Wilson, 346 U.S. 137, 139 (1953) (emphasis added); *see also Davis v. Marsh*, 876 F.2d 1446, 1449 (9th Cir. 1989) ("we accord even more deference to military court determinations than to those of state courts.").

The military court system is an integrated system created by Congress to carry out its mandate to make rules for the government and regulation of the armed forces. U.S. Const., Art. I, § 8. The Article III courts have rightfully been reluctant to entertain claims challenging military court decisions.

> *Councilman* indicates that there are two principal reasons why considerations of comity normally preclude a federal court from intervening in a pending court-martial proceeding. First, the military justice system must remain free from undue interference, because "the military is a 'specialized society separate from civilian society' with 'laws and traditions of its own developed during its long history.'" * * * Second, Congress sought to balance the competing interests in military preparedness and fairness to service members charged with military offenses, by "creating an integrated system of military courts and review procedures." * * * "It must be assumed that the military court system will vindicate servicemen's constitutional rights." * * * Thus, as suggested in *Parisi* [*v. Davidson,* 405 U.S. 34 (1972)], the doctrine of comity aids the military judiciary in its task of maintaining order and discipline in the armed services, eliminates needless friction between the federal civilian and military judicial systems, and gives due respect to the autonomous military judicial system created by Congress.

New v. Cohen, 129 F.3d 639, 643 (D.C. Cir. 1997) (internal citations omitted).

There are only two exceptions to the rule that an Article III court must "await the final outcome of court-martial proceedings in the military justice system before entertaining an action by a service member who is the subject of a court-martial." *Id.* at 644. The first exception is drawn from the case of

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Parisi v. Davidson, 405 U.S. 34 (1972). The second exception is when the military has no jurisdiction over the accused because he or she is a civilian. *Id.*; *see Councilman*, 420 U.S. at 759. It cannot be seriously disputed that the second exception does not apply here as petitioner does not challenge the military's jurisdiction over his person. And, as established below, he cannot establish the applicability of the first exception either. Thus, the petitioner must "await the final outcome of court-martial proceedings in the military justice system" before his habeas corpus petition can be heard by an Article III court. *New*, 129 F.3d at 644.

Petitioner's memorandum never mentions *Councilman*. Instead, it attempts to circumvent the *Councilman* rule precluding interlocutory review of court-martial proceedings in Article III courts, exclusively relying on *Parisi*. But *Parisi* created only a narrow exception to the general rule espoused in *Councilman*, and that exception has no application to the facts of this case.

Nine months after induction into the Army as a draftee, Parisi applied to military officials for a discharge as a conscientious objector. That application was ultimately denied. He then sought administrative review of that denial by the Army Board for Correction of Military Records (ABCMR). Four days later, he filed a habeas corpus petition, claiming that the Army's denial of his conscientious objector application was without basis in fact. The district court declined to consider the merits of his petition, but retained jurisdiction pending a decision by the ABCMR. Shortly thereafter, Parisi received orders to report to Fort Lewis for deployment to Vietnam. He unsuccessfully sought a stay of that order pending appeal of the habeas corpus denial. He reported to Fort Lewis, but ultimately refused to obey a military order to board a plane for Vietnam. As a result, he was charged with disobeying a superior commissioned officer. While the court-martial charges were pending, the ABCMR rejected Parisi's application. The District Court ordered the Government to show cause why the pending writ of habeas corpus should not issue. The Government moved to defer consideration of the habeas corpus petition until final determination of the criminal charge then pending in the military court system, and the district court so ordered.

Eight days later, a court-martial convicted Parisi of disobeying a lawful order. The Ninth Circuit affirmed the district court's order, and Parisi sought certiorari from the United States Supreme Court. At the time of oral argument in the Supreme Court, review of his conviction was pending in the Army Court

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of Military Review. The Supreme Court reversed. The Court emphasized that the issue before it in that case "*[did] not concern a federal district court's direct intervention in a case arising in the military court system.* Parisi's application for an administrative discharge--upon which the habeas corpus petition was based-- antedated and was independent of the military criminal proceedings." 405 U.S. at 41 (emphasis added, citations omitted). On those facts, the narrow question, as the Court saw it, was therefore, "whether a federal court should postpone adjudication of an independent civil lawsuit clearly within its original jurisdiction." *Id.* The Court held that neither the doctrine of exhaustion of administrative remedies nor that of "comity between federal civilian courts and the military system of justice . . . required a stay of the habeas corpus proceedings." *Id.* at 37.

The facts of *Parisi* are so clearly distinguishable from this case as to make that holding inapposite. Contrary to petitioner's assertion that Parisi filed his "habeas corpus petition while his court-martial charge was pending," Motion for Emergency Stay, p. 4, Parisi's habeas corpus proceeding predated not only the convening of the court-martial, but also the commission of the misconduct. *Id.* at 36. Furthermore, the district court did not have to address any issues relating to the court-martial in order to rule on the habeas corpus petition. Properly viewed in this light, it is clear that petitioner does not fall into the narrow exception created by *Parisi*. As such, he must continue to raise his arguments in the military court system. If, and only if, petitioner is convicted and has exhausted his post-trial appellate remedies, is it possible for him to invoke this Court's habeas corpus jurisdiction and attempt a collateral attack on his court-martial. As the D.C. Circuit held, "any attempt to extend the *Parisi* exception beyond the circumstances of that case would wreak havoc on military discipline." *New*, 129 F.3d at 645.

The Supreme Court elaborated on these same principles in *Councilman*, *supra*, 420 U.S. 797, where it addressed the appropriateness of any federal court intervention in ongoing military proceedings. In that case, Bruce Councilman, an Army captain, was charged at Fort Sill, Oklahoma, with the sale, transfer, and possession of marijuana. At his trial by general court-martial, Captain Councilman requested that the charges against him be dismissed for lack of jurisdiction. His motion was denied and his request for a continuance of the court-martial was granted. During the recess, Councilman brought suit in the United States District Court for the Western District of Oklahoma to enjoin the military

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authorities from proceeding with his court-martial. The District Court enjoined the court-martial, and the Court of Appeals for the Tenth Circuit affirmed. The Supreme Court reversed.

The Court noted that the military is "'a specialized society separate from civilian society'" with "'laws and traditions of its own [developed] during its long history,'" whose primary business it was "'to fight or be ready to fight wars should the occasion arise.'" *Id.* at 757 (citations omitted). Recognizing that "the military must insist upon a respect for duty and a discipline without counterpart in civilian life," *id.*, the Court observed that "Congress attempted to balance these military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted." *Id.* at 757-58. That mechanism was "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges 'completely removed from all military influence or persuasion,' who would gain over time thorough familiarity with military problems." *Id.* (citations omitted). The Court pointed out that "the military court system generally is adequate to and responsibly will perform its assigned task . . . and will vindicate servicemen's constitutional rights." *Id.* The Court then squarely held "that when a serviceman charged with crimes by military authority can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." *Id.*

The Supreme Court reiterated this position in *McLucas v. DeChamplain*, 421 U.S. 21 (1975), in which an Air Force officer claimed that the UCMJ article of which he was convicted was unconstitutional and that his counsel had unconstitutionally been denied access to relevant documents. Before the Supreme Court, DeChamplain contended that his court-martial should be enjoined, for if he were to be convicted, he might remain incarcerated pending review of his conviction within the military court system on the basis of a constitutionally defective trial. The Court squarely rejected that argument,

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stating:

> But if such harm were deemed sufficient to warrant equitable interference into pending court-martial proceedings, any constitutional ruling at the court-martial presumably would be subject to immediate relitigation in federal district courts, resulting in disruption of the military appellate system provided by Congress. We hold that relief . . . is precluded squarely by our holding in *Schlesinger v. Councilman*, that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention."

Id. at 33.

As these cases make clear, there is a delicate balance and interplay between the Article III courts and the military courts. Congress created both the Article III courts and the military courts under its constitutional authority. In doing so, Congress created coordinate judicial systems for adjudicating crimes of federal import. While the two systems have jurisdiction over different citizens, there must be a mutual respect. This respect is embodied in the doctrine of comity. "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff v. Willoughby*, 345 U.S. 83, 94-95 (1953). Intervention in pending court-martial proceedings outside of the narrow exceptions outlined above upsets the balance created by Congress between the two systems and usurps the power of the Congressionally created "integrated system of military courts and review procedures." *Councilman*, 420 U.S. at 757.

When asked to review a court-martial decision, a district court's comity analysis is separate and distinct from the analysis it uses to review state court decisions. *See Burns v. Wilson*, *supra*, 346 U.S. at 139. This is true not only because the military is "'a specialized society separate from civilian society'" with "'laws and traditions of its own [developed] during its long history,'" whose primary business it is "'to fight or be ready to fight wars should the occasion arise,'" *Councilman* 420 U.S. at 757 (citations omitted), but also because of the fact that military courts are a product of the same sovereign as Article III courts. The standard of review of military habeas corpus cases is highly deferential. Article III courts may only examine the merits of military court decisions if the military has not given "full and fair" consideration to the issue. *Burns*, 346 U.S. at 142. As long as the military courts have afforded a petitioner "full and fair" consideration, Article III courts do not reexamine the issue nor

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reweigh the evidence. *Id.* at 144 ("it is not the duty of the civil courts simply to repeat that process -- to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims.") (citation omitted).

While petitioner has pointed to *Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004), and relies on it for the proposition that 28 U.S.C. § 2241 confers habeas jurisdiction to hear pretrial double jeopardy claims, that case did not arise out of an adjudication by a military court. And while the district court in the case under appellate review by the Ninth Circuit Court of Appeals did entertain a pretrial double jeopardy claim arising out of a prosecution by the State of Hawaii, importing that same practice here, where the underlying proceeding is a military court-martial, simply cannot be reconciled with the rule established in *Councilman*. Indeed, the petitioner has not pointed to a *single case* post-Councilman in which a district court's determination to undertake interlocutory review under 28 U.S.C. § 2241 of any claim, double jeopardy or otherwise, brought by a servicemember and arising out of a court-martial, has been sustained on appeal. Respondents are also unaware of any such case.

Not only has the petitioner failed to identify any authority, but also the unique nature and status of the military weighs against such a conclusion. Petitioner misses or ignores the central issue in this case: the uniquely stringent limitations that the Supreme Court has imposed on intervention by civilian courts into ongoing court-martial proceedings. Through his sweeping and semi-accurate summaries of

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civilian appellate procedure, petitioner invites this Court to treat this case and this petitioner as if he were a state criminal defendant or an Article III defendant not an officer in the United States Army.[2] This invitation flies in the face of, and is directly contrary to, the holdings of the Supreme Court that establish the unique nature of the military court system and the heightened deference owed to military courts. Aside from the two exceptions outlined above, Article III courts must scrupulously avoid intervening in court-martial proceedings until after all post-trial appellate rights have been exhausted.

The miliary justice system was created by Congress to address the special considerations and demands inherent in the nature and mission of the military. "Congress sought to balance the competing interests in military preparedness and fairness to service members charged with military offenses by 'creating an integrated system of military courts and review procedures.'" *New*, 129 F.3d at 643. The importance of these considerations is most apparent in times such as these when the military is engaged in combat in multiple theaters with the enemies of the United States. Servicemembers are entitled to appropriate constitutional protections even in times of conflict, but it is the military courts that have been charged by Congress with safeguarding these rights, not Article III courts. *See Councilman, supra,* 420 U.S. at 746 ("[Congress] has . . . never deemed it appropriate to confer on this Court 'appellate jurisdiction to supervise the administration of criminal justice in the military.'") (*quoting Noyd v. Bond*, 395 U.S. 683, 694 (1969)). Outside of the two exceptions outlined above, servicemembers must wait until after their court-martial and their subsequent military appeals before they may seek habeas corpus relief in federal district court, as the resolution of their claims and the protection of their rights has been

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[2]For example, petitioner states "the rule in this Circuit . . . is that if a criminal defendant presents a colorable, non-frivolous [double jeopardy] claim . . . the federal courts must issue a stay preventing the trial from going forward, and that stay must be maintained until appellate review . . . is completed." This appears to be a reference to the rule set out in *U.S. v. Claiborne*, 727 F.2d 842 (9th Cir. 1984). Petitioner later asserts that "[u]nder the rule of *Claiborne*, he is entitled to such a stay unless his claim is frivolous." Emergency Stay Motion, p. 14. Petitioner's analysis ignores the fact that *Claiborne* was a federal criminal prosecution that arose in the district court. *Claiborne* applied the "judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." *Id.* at 850. This continued reliance on the *Claiborne* divestiture rule is misplaced. *Claiborne* was not a habeas corpus case and so it does not deal with the special concerns implicated in habeas corpus cases generally or requests to intervene in military courts-martial specifically. *Claiborne* stands *only* for the proposition that an appellant is entitled to review of his or her double jeopardy claim in the court with appellate jurisdiction over the trial court from which the claim arises. Petitioner received his appellate review in the military appellate courts prior to his retrial. Therefore, even if *Claiborne* applied to the military court system, the petitioner's asserted right to pretrial appellate review has already been satisfied in this case.

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entrusted to the military court system. "It must be assumed that the military court system will vindicate servicemen's constitutional rights" *New*, 129 F.3d at 643.[3]

The Supreme Court's opinion in *Councilman* controls: the military court system will perform responsibly its assigned task, and the petitioner can show no harm other than that attendant to resolution of his case in the military court system. The desire to avoid the "needless friction" that the *Noyd* Court recognized would result if federal courts were allowed to intervene in ongoing military judicial proceedings, and the need to foster "respect for coordinate judicial systems" the *Councilman* Court emphasized, require that this Court refuse to intervene in the ongoing military court-martial process.

II. Petitioner Cannot Meet the High Standard Required for the Granting of Injunctive Relief

Although petitioner captions his pleading as a request for "a stay," in substance he is asking this Court to enjoin the military from proceeding with a court-martial. As the court-martial is not an Article III court, this is in effect a request for a preliminary injunction. *See New v. Perry,* 1996 U.S. Dist. LEXIS 348, *2 (D.D.C. 1996). In order to obtain injunctive relief, petitioner must satisfy either the "traditional" or "alternative" test. *Zango, Inc. v. Kaspersky Lab Inc.*, 2007 U.S. Dist. LEXIS 41097, *2-3 (W.D. Wash. 2007). Under the traditional test, the Court must find that: (1) the moving party will suffer irreparable injury if the relief is denied, (2) the moving party will probably prevail on the merits, (3) the balance of potential harm favors the moving party, and (4) the public interest favors granting relief. *Cassim v. Bowen,* 824 F.2d 791, 795 (9th Cir. 1987). The alternative test requires the Court to find: (1) a combination of probable success and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Id.* Under this last part of the alternative test, "even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits." *Johnson v. Cal. St. Bd. of Accountancy,* 72 F.3d 1427, 1430 (9th Cir.1995). The two prongs of the alternative test are not separate inquiries, but rather "extremes of a single continuum." *Clear Channel Outdoor, Inc. v. City of*

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[3]*See also Williams v. Sec'y of the Navy*, 787 F.2d 552, 560 (Fed. Cir. 1986) ("Congress having provided the extensive and elaborate system designed to achieve justice within the military, no warrant appears for judicial end-running of that system. If the rush to the federal courthouse and bypassing the congressionally created system attempted here . . . were permissible, Congress would be well advised to dismantle the military justice system as no longer required.") (citation omitted).

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Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003). "[T]he less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Southwest Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 918 (9th Cir. 2003).

A "preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted) (emphasis in original). In cases that implicate the public interest, the district court must also consider whether the public interest favors issuance of the injunction. *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). And, in cases involving the military, an even stronger showing is required. As the Ninth Circuit said in *Hartikka v. United States*, 754 F.2d 1516 (9th Cir. 1985):

> [I]n cases involving the military, the moving party must make a much stronger showing of irreparable harm than the ordinary standard for injunctive relief. That is, where the balance of harms tips less decidedly toward a petitioner, he must make a greater showing of a likelihood of success on the merits than where the balance tips decidedly in his favor. The necessity of making this stronger showing is implicit in the magnitude of the interests weighing against judicial interference in the internal affairs of the armed forces.

Id. at 1518 (internal citation omitted). As the petitioner has no chance of succeeding on the merits, he fails to satisfy either test for injunctive relief, and his request to stay the court-martial should be denied.

A. Petitioner Cannot Establish That He Will Suffer Irreparable Injury

The petitioner will not suffer irreparable injury if his request for injunctive relief is denied. Petitioner has already been afforded appellate review of his double jeopardy argument. ACCA, as did the trial court, declined to afford petitioner the relief requested. The petitioner is now asking this Court to intervene in a properly constituted military disciplinary proceeding in an unprecedented way. It is important to properly define the potential harm that the petitioner faces. The potential harm is *not* that the petitioner will have to face a trial that he claims violates his double jeopardy rights before being afforded appellate review, but that he will face trial after having unsuccessfully sought relief on his double jeopardy claim in both trial and appellate courts, and before having obtained unprecedented interlocutory habeas review in an Article III court. Petitioner's attempt to paint the issue as being forced to stand trial without review of his double jeopardy claim is at odds with the facts. He has already had

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appellate review, and therefore can "show no harm other than that attendant to resolution of his case in the military court system," a showing which provides an insufficient basis for intervention by federal courts. *DeChamplain*, 421 U.S. at 33. This does not satisfy the heightened showing of irreparable harm required by the Ninth Circuit's holding in *Hartikka, supra*, 754 F.2d at 1518.

Petitioner's contention that *Abney v. United States*, 431 U.S. 651 (1977), supports his application misses the mark for two reasons. First, the rule announced in *Abney* is a procedural rule that applies to appeals from U.S. District Courts to the Circuit Courts of Appeals under 28 U.S.C. § 1291. It goes without saying that the jurisdictional basis, and procedural posture of this case are worlds removed from that of the case under consideration in *Abney.* The petitioner here is not taking an interlocutory appeal from a district court to a court of appeals pursuant to 28 U.S.C. § 1291. Indeed, as distinguished from *Abney*, this case is not presently before a court of appeals at all. Rather, petitioner is seeking collateral review in a district court of an uncompleted court-martial by means of a petition for a writ of habeas corpus. As such, procedural rules established for § 1291 appeals are not applicable in this case. Second, and more importantly, petitioner has already received his appellate review. ACCA, akin to a Circuit Court of Appeals, has heard his case on the merits and denied his double jeopardy claim. As distinguished from *Abney*, there is no need to stay the court-martial proceedings to allow for appellate review when that review has already taken place.

B. The Petitioner Has No Likelihood of Success on the Merits

1. The Petitioner's Double Jeopardy Claim Has Received Full and Fair Consideration

As set out above, this Court should refrain from intervening in this case because interjecting itself into the process would be contrary to the well-established principles of comity and equitable jurisdiction. If, however, the Court decides that it may entertain the petitioner's request for relief, the Court's inquiry must be very limited and deferential to the determination reached by the military courts. Article III courts review military court decisions only to determine if the military has given "full and fair" consideration to the issue raised. *Burns*, 346 U.S. at 142. As long as the military courts have afforded a petitioner "full and fair" consideration, Article III courts do not reexamine the issue on the merits nor reweigh the evidence. *Id.* at 144.

The record in this case establishes beyond question that the trial court and ACCA gave "full and

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fair" consideration to the petitioner's double jeopardy claim. The procedural history reveals the exhaustive consideration of petitioner's double jeopardy claim by the military courts. On May 17, 2007, petitioner filed his First Petition and Application for Stay of Proceedings with ACCA, asking that all charges and specification be dismissed on double jeopardy grounds. On May 18, 2007, ACCA issued an order to the Government to provide an authenticated record of trial for the pre-mistrial court-martial proceedings (R. I) and to show cause why the writ should not be granted. ACCA also granted petitioner a limited stay, allowing the trial court to proceed with pretrial matters up to, but not including, assembly of the court-martial. Thereafter, on June 29, 2007, ACCA denied petitioner's writ and lifted the stay, on the grounds that petitioner failed to first seek relief at the trial court level.

On July 2, 2007, petitioner filed a motion to dismiss, on double jeopardy grounds, in the trial court. On July 11, 2007, after receiving evidence and taking argument, the military judge issued written findings of fact and conclusions of law, denying petitioner's motion to dismiss.

On July 27, 2007, petitioner filed his Second Petition and a second Application for Stay of Proceedings with ACCA. On August 27, 2007, petitioner filed a motion with ACCA, requesting an expedited ruling on their stay application. On August 28, 2007, after having reviewed the record and receiving argument, ACCA denied petitioner's Second Petition, on its merits, and his application for a stay.

On September 17, 2007, petitioner filed a Petition for a Writ of Prohibition and an Application for Immediate Stay of Trial Proceedings in CAAF. On October 5, 2007, after receiving briefing from the parties, CAAF declined to grant review of petitioner's application.

This recitation of the procedural history makes it clear that petitioner has received ample due process with respect to his double jeopardy argument at various levels of military courts. Both the trial

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court and ACCA considered the petitioner's lengthy filings and the oppositions filed by the government before reaching the conclusion that his double jeopardy argument was not meritorious.[4]

2. The Petitioner is Unlikely to Prevail on the Merits of his Double Jeopardy Claim

Even if this Court concludes that it may review the petitioner's double jeopardy claim on the merits, the merits of this case are clear: there was manifest necessity for the declaration of the mistrial and, therefore, there is no double jeopardy bar to a second prosecution. The trial court set out the proper standard for reviewing a double jeopardy motion following the grant of a mistrial as "retrial is permitted only when 'there is manifest necessity for the act, or the ends of public justice would otherwise be defeated.'" JA, p. 333. The trial court concluded that there was "manifest necessity" for a mistrial, and ACCA correctly affirmed the trial court decision. The appropriate standard of review of a decision to declare a mistrial is an abuse of discretion. *U.S. v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993); *U.S. v. Vincent*, 758 F.2d 379, 380 (9th Cir. 1985). This must be so as "the trial court has a 'superior point of vantage,' and . . .'it is only rarely--and in extremely compelling circumstances--that an appellate panel, informed by a cold record, will venture to reverse a trial judge's on-the-spot decision.'" *U.S. v. Freeman*, 208 F.3d 332, 339 (1st Cir. 2000).

After the government had rested, but before the defense had begun its presentation of evidence, the trial judge detected what he believed was a misunderstanding on the part of the trial defense counsel and the petitioner as to the nature of the stipulation of fact to which he had agreed. R. I, p. 354.

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[4]The conciseness of the ACCA decision does not undercut the conclusion that it gave full and fair consideration to the petitioner's claims.

> We think that appellant's contention is clearly without merit, for we are aware of no requirement that appellate courts, military or otherwise, must discuss in detail each and every contention -- no matter how specious -- of every appellant. The Board of Review in this case quite apparently devoted its opinion to a discussion of only those contentions which appeared to it to be colorably creditable. It did explicitly state, however, that: "We find no merit in any of the 16 assignments of error urged upon us by appellate defense counsel." Subsequently, the Court of Military Appeals denied, in a one sentence order, appellant's petition for grant of review of the decision of the Board of Review. That court, too, obviously thought there was no merit to appellant's assignments of error. And since both these appellate military courts had the benefit of the extensive discussion appearing in appellant's briefs concerning the alleged inadmissibility of his statements, we can only conclude, as did the district court, that appellant received full and fair consideration of his claims in the military courts.

Thompson v. Parker, 399 F.2d 774, 775-76 (3d Cir. 1968), *cert. denied*, 393 U.S. 1059 (1969); *see also King v. Moseley*, 430 F.2d 732, 735 (10th Cir. 1970).

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Following an extensive inquiry, the judge determined that indeed there was a fundamental misunderstanding on the part of the trial defense counsel and the petitioner as to the nature of the stipulation. R. I, p. 372. Pursuant to RCM 811, "the military judge should not accept a stipulation if there is any doubt of the accused's or any other party's understanding of the nature and effect of the stipulation."[5] The judge's refusal to accept the stipulation of fact resulted in a material breach of the pretrial agreement. R. I, p. 379. Once the court had rejected the stipulation of fact, the government moved for a mistrial over the defense's objection. R. I, pp. 374-75. The court granted the mistrial motion. R. I, p. 375.

The relevant inquiry in reviewing the grant of a mistrial is whether the trial court's finding of manifest necessity was an abuse of discretion. *Vincent*, *supra*, 758 F.2d at 380. At the outset, it is important to note that "an explicit finding of 'manifest necessity'" is not required to sustain the grant of a mistrial. *Arizona v. Washington*, 434 U.S. 497, 516-17 (1978). Instead, the ruling may be upheld if "the record provides sufficient justification for the . . . ruling." *Id.* The record in this case makes clear that the trial court did not abuse its discretion when it granted the government's motion for a mistrial.

The gravamen of petitioner's argument that there was not manifest necessity for the declaration of the mistrial is that the trial judge did not need to reject the stipulation of fact, and, therefore, had he not rejected the stipulation of fact, he would not have had to declare a mistrial. Motion for Emergency Stay, pp. 14-21. The contention that the judge did not have to reject the stipulation of fact is devoid of merit and beside the point. *See* n.3, *supra*. This Court is not reviewing the trial court's rejection of a stipulation of fact pursuant to a procedural rule of the military court system. This Court is examining

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[5]The misunderstanding centered on the confessional nature of the stipulation. The accused agreed during the initial inquiry that the stipulation of fact was a confessional stipulation, R. I, p. 127, that is it "practically amounts to a confession to which a not guilty plea is outstanding." RCM 811(c), Discussion. During the trial court's renewed inquiry, an inquiry it was required to undertake pursuant to *U.S. v. Bertelson*, 3 M.J. 314, 315-17 (C.M.A. 1977), the accused made it clear that he did not intend to enter into a stipulation that admitted every element of the missing movement charge. R. I, p. 363. The accused believed that there was an additional intent element to the crime to which he had not stipulated. R. I, pp. 354-55. However, the military judge had already ruled that as a matter of law there was no additional element and the accused would not be permitted to challenge the legality of the order he was given nor the legality of the Iraq war. R. I, App. Ex. XXI. Strikingly, this position is in contrast to the accused's earlier acknowledgment that the government did not have to introduce any evidence outside of the stipulation for him to be convicted of the crime. R. I, p. 127. As set out in the trial court's order denying petitioner's double jeopardy motion, the petitioner's continued insistence that there was not a misunderstanding regarding the stipulation is meritless. JA, p. 334.

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ACCA's review of the trial court's rejection of a motion to dismiss a post-mistrial prosecution on double jeopardy grounds. While the military judge did not use the magic words "manifest necessity" when he declared the mistrial, manifest necessity is apparent from the record.[6] The facts of this case support the military judge's finding that the trial was irreparably tainted and that petitioner's belatedly proposed alternative remedies were inadequate. JA, pp. 337-38.

During the government's case, the court-martial panel (panel) was presented, through the stipulation of fact, with incontrovertible evidence that the petitioner committed a serious crime. R. I, pp. 263, 270. Permitting the panel members to hear the confessional stipulation that proved all the elements of a crime and then removing the evidence would not serve the "interests of justice" and would "cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). The military judge articulated this concern when discussing the possibility of giving a curative instruction regarding the now rejected stipulation of fact by stating that he did not know how to "unring that bell." R. I, p. 372. This is clear evidence of the judge's conclusion that the panel could not disregard the previously admitted stipulation. The judge's rejection of the stipulation of fact meant that the pretrial agreement was breached. R. I, p. 379. If the judge had not declared a mistrial and the government had chosen to go forward with the two charges that had been dismissed pursuant to the pretrial agreement, this would have necessitated a second trial for these two charges. JA, p. 337. If the petitioner had been convicted of any of the charges at the first trial, these convictions could have been introduced as aggravation evidence in the second trial. *Id.* Also, to allow the petitioner to gain the benefit of his pretrial agreement, the dismissal of the two charges, but deny the government the benefit of the same agreement, the incontrovertible stipulation of fact, would not have served the interests of justice.

Petitioner claims that the military judge abused his discretion, in part, because he did not consider alternatives to a mistrial. Motion for Emergency Stay, pp. 21-23. Specifically, petitioner claims a continuance, a possible agreement between the parties to alter the stipulation of fact, or a partial mistrial should have been considered by the military judge. *Id.* Putting aside that the petitioner ignores the fact that the judge explicitly considered a curative instruction, none of the petitioner's proposed

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[6]The military judge subsequently ruled, in denying the petitioner's motion to dismiss, that "[t]here was a manifest necessity to declare a mistrial under the facts of this case." JA, p. 338.

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alternatives would have been sufficient to overcome the "substantial doubt upon the fairness of the proceedings." RCM 915(a).

First, as previously noted, the panel was irreparably tainted through admission of the confessional stipulation, and a continuance would not have remedied the taint. The panel heard the petitioner confess to the essential elements of the crime, and regardless of the length of the continuance, the fairness of the proceedings would be in "substantial doubt." The stipulation contained inflammatory statements made by the accused that were otherwise inadmissible. JA, p. 337. The trial judge found that "no curative instruction would have been sufficient to cure the taint of these statements." *Id.* "[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Arizona*, 434 U.S. at 511.

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

Id. at 513-14 (internal citations omitted).

Second, the trial defense counsel, after consulting with petitioner, affirmatively stated that "we do not wish to withdraw from the stipulation" moments before the Government moved for a mistrial. R. I, p. 373. Petitioner's attempt to preserve inviolate the original contents of the confessional stipulation, even after the judge removed it from evidence, demonstrated that petitioner would not agree to a revised version of the stipulation. Similarly, the Government's motion for a mistrial evidenced the unlikelihood that they would enter into a revised stipulation. The stipulation of fact was a contract between the government and the defense, and the trial judge had no authority to order a renegotiation of that agreement. The petitioner now proposes a partial mistrial and a modified stipulation on the ground that this would have permitted the conduct unbecoming an officer charges to go forward. Motion for Emergency Stay, pp. 22-23. This suggestion does not address the fate of the charges that had been dismissed pursuant to the pretrial agreement. Further, a modified stipulation would have done nothing to "unring the bell" in that the panel had already received the petitioner's stipulation containing

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admissions to every element of missing movement. JA, p. 334. This stipulation irrevocably and impermissibly tainted the proceedings since the Government would not have been able to proceed on the missing movement charge following a partial mistrial.

Third, because of the breach of the pretrial agreement, the Government was then permitted to prosecute petitioner on the previously dismissed charges. R. I, p. 374. This could have occurred in two ways, both of which would have been prejudicial to the petitioner. If the charges had been reinstated, and it is not clear that could have been accomplished, *see*, *e.g.* R. II, pp. 66-68, it would prejudice petitioner for the court to tell the panel that new charges were being added. If the charges were tried in a subsequent proceeding, the original convictions, if any, could be used as aggravation evidence against the petitioner. Additionally, if the petitioner were tried serially for his alleged offenses, this would put him twice in jeopardy of receiving a dismissal from the service, the officer equivalent of a dishonorable discharge. While his maximum period of incarceration would not increase as a result of the offenses being tried separately, the second court-martial would have had the opportunity to sentence him to a dismissal even if the first panel had elected not to do so.

Any suggestion by petitioner that the trial judge granted a mistrial lightly or precipitously is not supported by the record. The trial judge identified a potential issue, discussed his concern at length with counsel for both sides and with the petitioner, and granted liberal recesses for the parties to confer with their client/supervisors prior to granting the mistrial. The court-martial came to order at 10:43 a.m. on February 6, 2007. The judge immediately notified the parties that he had concerns about the stipulation of fact and was going to reopen the inquiry. R. I, p. 354. After approximately 15 minutes of discussion, the court recessed for approximately 90 minutes. R. I, p. 361. When the court-martial resumed, the trial judge resumed his inquiry into the stipulation of fact to include talking to the petitioner and hearing from both sides. R. I, pp. 361-370. After 25 minutes, the court recessed again, this time for 23 minutes. R. I, p. 370. Following the recess, the judge again resumed his inquiry for approximately 10 minutes at which time the government counsel requested a 15 minute recess to speak to his supervisor. R. I, p. 372-73. This recess lasted for 41 minutes. R. I, p. 373. When the court-martial resumed, the government counsel moved for a mistrial. R. I, p. 374. Thus, it was not until more than three hours and three recesses after the judge had first raised the possibility of declaring a mistrial that he granted the

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government's mistrial motion. This can by no means be considered precipitous. The record "provides sufficient justification," *Arizona*, 434 U.S. at 516-17, for the trial judge's conclusion that there was no reasonable way to save the trial from the taint that petitioner and his attorney created through their misunderstanding of the law and the stipulation of fact.

C. The Harm to the Army Outweighs the Harm to the Plaintiff

Issuance of an injunction in this case will substantially harm the Army. The intrusion of an injunction "would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." *Orloff*, 345 U.S. at 94-95; *Guerra v. Scruggs*, 942 F.2d 270, 275 (4th Cir. 1991); *Kries v. Sec'y of the Air Force*, 866 F.2d 1508, 1513-14 (D.C. Cir. 1989); *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). These and other cases establish that an injunction that interferes with the proper functioning of our military forces has the potential for substantially harming the Army and cannot be said to be in the public interest. The balance of hardships tips decidedly in favor of the Army. In fact, "[t]he governmental interest in raising an army has, without exception, been considered by the courts to be paramount. Thus the ordinary [injunction] balancing tests are rendered almost irrelevant by the transcendent importance of the war power." *Parrish v. Brownlee*, 335 F. Supp. 2d 661, 669 (E.D.N.C. 2004) (citing *Antonuk v. United States*, 445 F.2d 592, 594 (6th Cir. 1971)).

D. An Injunction Will Disserve the Public Interest

Congress and the President are empowered by the Constitution with the running of the military. Under these constitutional provisions, Congress has enacted 10 U.S.C. Chapter 47, the UCMJ, which provides the rules and procedures of military law. The UCMJ includes the provisions for ACCA and CAAF. 10 U.S.C. §§ 866, 867. Thus, the administration of military justice has been constitutionally reserved to the executive and legislative branches who have established independent tribunals to try service members charged with criminal offenses and to decide legal issues incident to those trials, such as constitutional challenges to courts-martial. Intervention by this Court, or any Article III court, upsets the careful balance established by the Constitution and statute and flies in the face of the "strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith." *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir 1997) (citation omitted).

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CONCLUSION

For the foregoing reasons, respondents Lt. Col. John Head and Lt. Gen. Charles Jacoby respectfully request that the application of petitioner 1LT. Ehren Watada for a preliminary injunction be denied.

DATED this 12th day of October, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the United States Attorney Office for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers.

That on October 12, 2007, she electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the plaintiff(s):

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To the person(s) who are non CM/ECF participants, service will be made via U.S. postal service, addressed as follows:

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DATED this 12th day of October, 2007.

s/Christine Leininger
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